CLERK'S COPY

In substantially the same manner the petitioner, on March 14, 1928, purchased 1,000 shares of the same stock with a loan from the First National Bank of Omaha and on March 20, 1928, he purchased 1,000 additional shares with a loan from the Omaha National Bank, the cost of each lot being $25,650. On April 13, 1928, the broker, on the petitioner's order, sold 2,000 shares for his account and on April 16, 1928, the petitioner got the identical certificates which he had put up as collateral at the banks when the shares were purchased and delivered them to the broker, receiving a check for the proceeds of the sale. One of the lots was sold for $29,310 and the other for $29,060.

On September 24, 1928, the petitioner instructed the broker to sell the remaining 1,000 shares of National Power & Light Co. stock, which he mistakenly thought was the balance in his trading account. In fact, there were only 900 shares in the trading account, being the same 900 shares that the petitioner had purchased in 1926. The broker, however, sold 1,000 shares for the petitioner's account, as he had been instructed to do, and notified the petitioner that his trading account was 100 shares short. The petitioner then instructed the broker to take 100 of the shares held in his collateral account and apply to the sale. The proceeds from the sale of the 1,000 shares were $39,835. The cost of the 900 shares [fol. 13] of trading stock was $21,150 and the cost of the 100 shares of collateral stock was $441.89.

On September 25, 1928, the petitioner purchased 2,000 shares of National Power & Light Co. stock for $84,375, and on October 2, 1928, 200 additional shares for $8,280, all of which he left in his trading account.

On December 31, 1928, the petitioner had on hand 800 shares in his collateral account and 2,200 shares in his trading account. He also had the 2,200 shares still on deposit as collateral at the Omaha National Bank and the 1,400 shares in his safety-deposit vault.

National Power & Light Co. Transactions of James E. Davidson in 1929

On January 3, 1929, the petitioner instructed the broker to sell 500 of the National Power & Light Co. shares in his trading account purchased September 25, 1928. On the same day the broker sold 500 shares for the petitioner's account

for $23,405 and, on petitioner's further instructions, purchased for his account 500 shares at a cost of $22,825.

On January 22, 1929, the petitioner instructed the broker to sell the 200 shares purchased on October 2, 1928. The broker sold 200 shares for petitioner's account on that day, the proceeds being $9,162. The profits on 100 of these shares belonged to another individual and were sent to him.

On January 28, 1929, the petitioner instructed the broker to sell 500 of the shares in his trading account purchased September 25, 1928, and also the 500 shares purchased January 3, 1929. On the same day the broker sold 1,000 shares for the petitioner's account for $53,785. Also, at about that time the petitioner took the remaining 1,000 shares in the trading account, purchased September 25, 1928, and deposited them as collateral on a loan at the Omaha National Bank. After these transactions there were no National Power & Light Co. shares left in the trading account. On February 11, 1929, the petitioner purchased through his trading account 600 shares for $31,905 and on February 15, 1929, he sold 600 shares for $32,871, leaving the trading account again exhausted.

On February 15, 1929, the petitioner withdrew the remaining 800 shares from the collateral account and put them in his safety-deposit vault with other securities. There were then no shares left in either the trading or the collateral accounts.

[fol. 14] All of the sales in 1929 up to this point were made through the trading account and the shares sold had never been issued to the petitioner but were held by the broker for his account in "street" names.

The next transaction in National Power & Light Co. stock occurred on March 27, 1929, when the petitioner purchased through the broker 1,000 shares with a part of the proceeds of a loan from the Omaha National Bank. Certificates for these shares numbered 80,250 to 80,258, inclusive, and 80,264 were delivered to the petitioner and put up as collateral with the bank as had been done in the previous transactions.

On June 19, 1929, the petitioner instructed the broker to sell 500 of the 1,000 shares purchased on March 27, 1929, certificates for which were on deposit at the Omaha National Bank. When the sale was made the petitioner called at the bank to get the certificates for delivery to the broker, but the bank refused to release them to the petitioner, stating

that they would make delivery themselves. The petitioner then instructed the bank to deliver 500 shares from the certificates numbered 80,250 to 80,258, inclusive, and 80,264. In making delivery of the certificates, however, a bank clerk, by mistake, delivered certificates from another lot which had been held as collateral by the bank since 1925. The mistake was not known by the petitioner at that time.

On July 1, 1929, the petitioner instructed the broker to sell the remaining 500 shares purchased on March 27, 1929. When this sale was made he instructed the bank to deliver to the broker certificates for 500 shares from the remainder of the certificates numbered 80,250 to 80,258, inclusive, and 80,264. Again, however, the bank made the same mistake and delivered to the broker certificates for 500 shares from the same lot which it had held as collateral since 1925. The selling price of the first 500-share lot sold by the broker on June 19, 1929, was $28,042.50 and of the second 500-share lot sold July 1, 1929, was $31,392.50. The cost of the 1,000 shares purchased by the petitioner on March 27, 1929, represented by certificates 80,250 to 80,258, inclusive, and 80,264, was $49,900. The cost of the 1,000 shares delivered to the broker by mistake was $4.42 per share or $4,420 for the 1,000 shares.

General Electric Co. Stock Transactions of James E. Davidson in 1929

On February 19, 1929, the petitioner, through his broker, purchased 100 shares of General Electric common for $22,[fol. 15] 705. A certificate for these shares, numbered 86,242, was received by the petitioner on March 4, 1929, and deposited as collateral with the Omaha National Bank, along with other collateral shares, to secure a loan of $147,000 which had been used to purchase these and other stocks. On March 26, 1929, the petitioner instructed his broker to sell the 100 shares purchased February 19, 1929. The broker sold the shares on that date and in completion of the sale the petitioner called at the bank and got the identical certificate numbered 86,242 which he had put up as collateral when the shares were purchased and delivered to the broker. The selling price of the 100 shares was $22,791. This was the petitioner's only transaction in General Electric Co. stock in 1929.

American Gas & Electric Co. Stock Transaction of Edith L. Davidson in 1929

On January 1, 1929, the petitioner, Edith L. Davidson, was the owner of 1,100 shares of American Gas & Electric Co. stock which she had purchased May 11, 1928, for $185,900. In purchasing these shares she had obtained a loan at the Omaha National Bank of $100,000, for which 700 of the shares were put up as collateral, and another loan from the First National Bank of $90,000, for which 400 shares were deposited as collateral. For each of these loans she executed a demand note in her own name. Certificates for the 1,100 shares purchased were delivered to her and deposited with the banks on July 6, 1928.

On January 2, 1929, a 52 per cent stock dividend was issued on the American Gas & Electric Co. stock and the petitioner received on her holdings 572 shares, which she placed in her safety-deposit vault. On January 10, 1929, the petitioner instructed the broker to begin selling the 1,672 shares which she then owned in 100 or 200-share lots so as not to break the market. Thereafter, the broker made sales as follows:

January 10, 1929	1,000 shares
January 16, 1929	500 shares
January 21, 1929	170 shares

The two remaining shares were not sold. The total proceeds of the sales were $246,340.70.

As the sales were made the certificates were taken from the banks and delivered to the broker. From the Omaha National Bank the petitioner got the identical certificates for the 700 shares that were on deposit there, but at the [fol. 16] First National Bank she was unable to get release of the certificates for the 400 shares there on deposit. The bank stated that it wanted to make its own delivery. In order to complete the transaction, however, the petitioner took from her safety-deposit vault certificates for 400 other shares of a previous stock dividend, together with 570 shares of the stock dividend of January 2, 1929, and delivered these certificates to the broker. When she received a check from the proceeds of these sales she paid off the loan at the First National Bank and got the certificates held by it, which she put in the safety-deposit vault in the place of the ones delivered to the broker.

The 400 shares which were taken from the safety-deposit vault for delivery to the broker were issued as a stock dividend on shares acquired by the petitioner previous to the purchase of the 1,100 shares on May 11, 1928, and had a cost to the petitioner of $27.50 a share. The cost of the 1,672 shares acquired by the purchase of the 1,100 shares on May 11, 1928, and the stock dividend of 572 shares on January 2, 1929, was about $109 each.

Opinion

Smith: The petitioners contend that the respondent has erroneously applied the first in, first out rule in computing their gains upon the above described sales of stock and that in each of the transactions involved the shares of stock sold were identified by their instructions to the broker to sell certain specified shares.

By amendments to his answers duly filed in each of the proceedings the respondent admits error in applying the first in, first out rule to the 400 shares of the American Gas & Electric Co. stock sold by Edith L. Davidson in 1929 and avers that such shares were identified by the certificates which the petitioner delivered to the broker in completion of the sale as those acquired by stock dividend, with a stipulated cost of $27.50 per share.

The respondent further avers that if the rule of first in, first out is held not applicable to the gains on the sale of certain of the shares of stock sold in 1928 and 1929 such gains are not taxable as capital net gains, as they were treated in the computation of the deficiencies herein, but are taxable as ordinary gains at the normal rate.

The respondent further avers in the amendment to his answer filed in Docket No. 72905 that, due to error in the computation of the deficiency therein asserted against Edith [fol. 17] L. Davidson, capital net gains were understated in the amount of $22,660.79.

For reasons hereinafter discussed we have found that the first in, first out rule is not applicable to any of the transactions involved in these proceedings, since in each transaction the shares sold were sufficiently identified. This ruling, however, does not dispose of the proceedings. We must still determine what shares were sold in each transaction and the amount of the profit or loss thereon.

The several transactions will be discussed in the order indicated in the above findings of fact.

National Power & Light Co. Transactions of James E. Davidson in 1928

As to the sale of the several lots of National Power & Light Co. shares in 1928, we think that there was an identification by the petitioner of all the shares sold and that the first in, first out rule is therefore inapplicable. The Commissioner's regulations, article 58 of Regulations 74, provide that this rule is to be applied only when the identity of the lots sold can not be determined. See Helvering vs. Rankin, 295 U. S. 123. In each of these sales the shares which the petitioner instructed the broker to sell had been bought and paid for by the petitioner and, with the exception of the 100 shares sold on September 24, 1928, the certificates for the shares had been issued to him. In each instance the petitioner instructed his broker to sell certain shares which he clearly identified by certificate numbers, and afterwards he delivered the shares so identified to the broker where they were not already in the broker's possession.

The respondent makes the argument that the evidence does not show that the broker actually sold the shares which the petitioner instructed him to sell or delivered to him for sale and that in fact the shares sold by the broker were all kept in "street" names and were not susceptible of identification. That is immaterial, we think. It is not identification by the broker, but the owner and seller of the shares, that is required. In Helvering vs. Rankin, supra, the Court said:

* * * It is true that certificates provide the ordinary means of identification. But it is not true that they are the only possible means. Compare Richardson vs. Shaw, 209 U. S. 365; 28 S. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981; Gorman vs. Littlefield, 229 U. S. 19; 33 S. Ct. 690, 57 L. Ed. 1047; Duel vs. Hollins, 241 U. S. 523, 36 S. Ct. 615, 60 L. Ed. 1143. Particularly is this so when, as here, [fol. 18] the thing to be established is the allocation of lots sold to lots purchased at different dates and different prices. The required identification is satisfied, if the margin trader has, through his broker, designated the securities to be sold as those purchased on a particular date and at a particular price. It is only when such a designation was not made at the time of the sale, or is not shown, that the "First-in, first-out" rule is to be applied.

The petitioner's instructions to the broker to sell certain specified shares and the subsequent delivery to the broker of certificates for the shares specified sufficiently identifies the shares sold.

National Power & Light Co. Transactions of James E. Davidson in 1929

As to the petitioner's 1929 transactions in the National Power & Light Co. stock a different situation is found. The first four sales in that year, 500 shares sold January 3, 200 shares sold January 22, 1,000 shares sold January 28, and 600 shares sold February 16, were all made through the petitioner's trading account with the broker, which was "long" at the time of the sales for the number of shares sold. No certificates for the shares sold had ever been issued to the petitioner. The shares were carried by the broker in "street" names and were not earmarked. In each instance the petitioner instructed the broker to sell certain shares purchased on a specified date. Under the decision of the Supreme Court in Helvering vs. Rankin, supra, that was a sufficient identification of the shares sold. Apparently, the transactions in Helvering vs. Rankin, supra, were conducted in substantially the same manner as the transactions here, since in both instances the shares sold had not been issued in the name of the customer or earmarked by the broker, but were held in "street" names.

In each of the two remaining sales in 1929, 500 shares sold June 19 and 500 sold July 1, the petitioner instructed the broker to sell certain shares represented by certificates which had been issued to him and were then being held by the bank as collateral on a loan. The petitioner expected to get these identical certificates from the bank and deliver them to the broker in completion of the sales, just as he had done in the 1928 sales, but through a mistake on the part of the bank other certificates, representing shares acquired at an earlier date, were delivered to the broker. In those circumstances, we think that the shares delivered to the broker were the shares actually sold by the petitioner. [fol. 19] In Miller vs. Commissioner (C. C. A., 2d Cir.), 80 Fed. (2d) 219, the rule pronounced in Helvering vs. Rankin, supra, was held to apply to transactions other than those conducted by a "margin trader." The fact there were that the broker, who had in his possession a number

of shares of stock which the taxpayer had purchased at different times and for different prices, was instructed to sell a certain number of shares from a specified lot, but instead sold and delivered to the purchaser shares from a different lot. The court held that the taxpayer's instructions to the broker to sell certain of the shares identified those shares as the ones sold, notwithstanding that the broker delivered other shares to the customer. In concluding its opinion, the court stated the three following rules:

* * * (1) that where there is no designation by the taxpayer at the time of making the sale, the certificate should be treated as the proper means for identification; (2) that a designation by instructions to the broker of the shares to be sold is controlling though the certificate delivered does not correspond with the instructions; (3) that the "First-in, first-out" rule applies only where there is neither identification by a certificate, nor by designation of the taxpayer.

In Uzal H. McCarter, 34 B. T. A.—(No. 81), the Board followed Miller vs. Commissioner, supra, with the qualification, however, that clause (2) of the above quotation from the court's opinion in that case should be construed to mean that a designation by instructions to the broker is controlling though the certificate delivered by the broker does not correspond with the instructions. Where the shares are already in the broker's possession there is nothing more for the seller to do after he instructs the broker to sell certain of those shares. Ordinarily, too, it is of no consequence to the broker or to the customer which shares are delivered by the broker. But as long as the petitioner has possession of the shares he is free to exercise his own choice and deliver whatever shares he may choose to in conclusion of the sale. In the instant case, for instance, the petitioner after instructing the broker to sell certain shares was free to change his mind about what shares he would dispose of and to deliver certificates for other shares. See also Horner vs. Commissioner, 72 Fed. (2d) 407, affirming 28 B. T. A. 360; Helen vs. Kelchner, 31 B. T. A. 262; George Vawter, 31 B. T. A. 884; affd.—Fed.—(C. C. A., 10th Cir., April 9, 1936). There is no suggestion in the Court's opinion in Helvering vs. Rankin, supra, that

the seller's instructions to the broker to sell certain shares would have prevailed as a means of identification over the fact of the delivery to the broker of certificates for other [fol. 20] shares, nor was this question presented by the facts in Miller vs. Commissioner, supra. In this case the delivery of the certificates by the petitioner or by the bank as his agent, we think, definitely identified the shares sold. The brokers sold the shares of stock represented by the certificates of indebtedness delivered—not those represented by some other certificates.

General Electric Co. Stock Transactions of James E. Davidson in 1929

The petitioner had only one completed transaction in General Electric Co. stock in 1929, involving the purchase of 100 shares on February 19 and the sale of those shares on March 26. The material facts with respect to the transaction are identical with those relating to the purchase and sale of the several lots of National Power & Light Co. stock in 1928. The petitioner received delivery of certificates for the shares purchased, deposited them with the bank as collateral on a loan, instructed the broker to sell those specific shares, and when the sale was made delivered the identical certificates to the broker in completion of the sale. The purchase price of the 100 shares was $22,705; the sale price $22,791, and the profit $86.

American Gas & Electric Co. Stock Transactions of Edith L. Davidson in 1929

The questions raised with respect to the transactions of Edith L. Davidson in American Gas & Electric Co. stock in 1929 have also been answered in our foregoing discussion of the sales of National Power & Light Co. shares by the petitioner, James E. Davidson, in 1929. There, other shares than those which the broker had been instructed to sell were delivered to him through a mistake on the part of the bank acting as agent for the petitioner. Here, other shares than those which the broker had been instructed to sell were delivered to him by the seller intentionally because she was unable to get possession of the shares which she had instructed the broker to sell. As to the identification of the shares sold there is no basis for a distinction in these transactions and, for the reasons already stated, we hold

that the shares sold were the shares actually delivered to the broker and not in part other shares which the seller instructed the broker to sell but did not deliver. We cannot sustain the petitioner's contention "that the delivery of a certificate other than the share representing that particular lot [which the broker was instructed to sell] because of inability to obtain the identical certificate from the bank [fol. 21] did not alter the transaction and that it still remained the sale of that specific lot."

With respect to the net capital gain question raised by the respondent in the amendments to his answers, it can be readily ascertained from the above stated facts whether the different lots of shares of stock sold by the petitioners in 1928 and 1929 had been held by them for a period of two years or more and therefore constituted capital assets within the meaning of section 101 of the Revenue Act of 1928. Where the shares sold had been held for less than two years the gains derived from such sales were not capital net gains, but were ordinary income taxable as such. Pursuant to the amended answers filed by the respondent the necessary adjustments in petitioners' tax liabilities will be reflected in the Rule 50 computations.

The further averment contained in respondent's amendment to his answer filed in Docket No. 72905 that Edith L. Davidson's net capital gains have been understated by the amount of $22,660.79 due to an error in the computation of the deficiency is supported by the evidence. The error appears on the face of respondent's Exhibit C. Adjustment in respect of this error likewise will be made in the Rule 50 computation.

Reviewed by the Board.

Judgment will be entered under Rule 50.

CONCURRING OPINION

MURDOCK Concurring:

The author of the prevailing opinion attempts to distinguish the present case from the Miller and McCarter cases on the ground that in the latter cases the delivery of the wrong certificate was made by the taxpayer's broker, while in the present case the wrong delivery was made either

ternal Revenue, and moves that leave be granted to file the attached amendment to the answer in order to make the pleadings conform to the proof.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel, E. C. Algire, Lloyd B. Harrison, Special Attorneys, Bureau of Internal Revenue.

Granted. Aug. 5, 1935.

Charles P. Smith, Member, U. S. Board of Tax Appeals.

[fol. 9] Before United States Board of Tax Appeals

[Title omitted]

Amendment to Answer—Lodged July 26, 1935, and Filed August 5, 1935

Comes now the respondent, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and amends his answer to the petition by adding thereto the following alternative plea, preceding the prayer as contained therein:

Further answering the petition the respondent alleges in the alternative that if it be judicially determined from the evidence adduced in this proceeding that the 500 shares of National Power & Light Company stock sold on June 19, 1929, and the 500 shares of said stock sold on July 1, 1929, as shown by a summation of the testimony contained in Petitioner's Exhibit No. 3, represented 1000 shares of stock purchased by the petitioner on March 27, 1929, and if it be judicially determined from the evidence adduced that the 100 shares of General Electric Company stock sold on March 25, 1929, as shown by the summation of testimony contained in Petitioner's Exhibit No. 5, represented 100 shares of said stock acquired by petitioner on February 19, 1929, then and in that event it should be held that the profit on said sales of stock is not subject to the rate of tax prescribed by the capital net gain provisions of the Revenue Act of 1928 as determined by the respondent, as shown by Exhibit A and Schedules Nos. 1 and 3, of Respondent's Exhibit B, but

that such profit is subject to the normal and surtax rates prescribed by said revenue act.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel: E. C. Algire, Lloyd B. Harrison, Special Attorneys, Bureau of Internal Revenue.

[fol. 10] Before United States Board of Tax Appeals

Docket Nos. 61741, 72904, 72905

Promulgated May 8, 1936

James E. Davidson, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Edith L. Davidson, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Opinion

As applied to sales through a brokerage account of shares of stock purchased at different times and at different prices the first in, first out rule is not applicable:

(a) Where the seller ordered the broker to sell certain specified shares which had been issued to him and put up as collateral for a loan and in completion of the sale the seller delivered to the broker certificates for the identical shares. The certificates delivered to the broker identified the shares sold.

(b) Where the seller ordered the broker to sell certain specified shares which had not been issued to the seller but were held by the broker in a "street" name. The order to the broker to sell certain specified shares identified the shares sold. Helvering vs. Rankin, 295 U. S. 123.

(c) Where the seller ordered the broker to sell certain specified shares which had been issued to him and deposited

with a bank as collateral on a loan, but in completion of the sale the bank by mistake delivered to the broker certificates for other shares. The certificates delivered to the broker identified the shares sold.

(d) Where the seller ordered the broker to sell certain specified shares which had been issued to him and deposited with a bank as collateral on a loan, but in completion of the sale the seller, being unable to get possession of the shares specified, delivered certificates for other shares. The certificates delivered to the broker identified the shares sold.

Edward J. Svoboda, Esq., and J. A. C. Kennedy, Esq., for the petitioners.

E. C. Algire, Esq., for the respondent.

These proceedings are for the redetermination of deficiencies in petitioners' income taxes as follows:

[fol. 11]

Petitioner	Docket No.	Year	Deficiency
James E. Davidson	61741	1928	$2,609.47
Do	72904	1929	9,352.50
Edith L. Davidson	72905	1929	10,156.14

It is alleged that in his computation of each of the deficiencies the respondent erred in applying the rule of first in, first out in computing the profit on the sale of certain shares of stock. The proceedings were consolidated for hearing.

Findings of Fact

The petitioners, James E. Davidson and Edith L. Davidson, are husband and wife. James E. Davidson is president of the Nebraska Power Co. He began active trading in stocks in about 1925. He then owned a number of shares of National Power & Light Co. stock which he put up with the brokerage firm of Logan & Bryan, hereinafter sometimes referred to as the broker, with instructions that the shares were to be preserved "intact" and kept as his "estate" unless he specifically ordered them to be sold. He further instructed his broker that his active trading was to be done in other shares which he would purchase on margin or with funds borrowed from the banks.

The transactions in question in these proceedings were all conducted through the brokerage firm of Logan & Bryan

in the name of petitioner James E. Davidson. Both of the petitioners had other stock transactions during the years involved which are not in controversy.

National Power & Light Co. Transactions of James E. Davidson in 1928

On January 1, 1928, the petitioner, James E. Davidson, had in his brokerage account 900 shares of National Power & Light Co. stock designated as "collateral" stock which he had put up with the broker in 1925 and 900 other shares of the same stock designated as "trading" stock which he had purchased in 1926. The cost of the collateral stock was $4.42 per share and of the trading stock $23⅜ per share. In addition to those shares the petitioner had 2,200 shares of the same stock on deposit as collateral with the Omaha National Bank and 1,400 shares in a safety-deposit vault.

In January, 1928, the petitioner arranged with the Omaha National Bank for a loan of approximately $25,000 with which to purchase 1,000 additional shares of National Power & Light Co. stock, with the understanding that the shares [fol. 12] purchased would be deposited with the bank as collateral for the loan. On the petitioner's instructions the broker purchased for his account 1,000 shares on January 27, 1928, at a cost of $25,337.50. The certificates for 900 of those shares, numbered 27,417 to 27,425, inclusive, were delivered to the petitioner on February 8, 1928, and a certificate for the remaining 100 shares, numbered 27,556, was delivered to him on February 16, 1928. On those dates the petitioner deposited the certificates with the bank in accordance with his agreement.

On March 9, 1928, the petitioner ordered the broker to sell the 1,000 shares purchased on January 27, 1928, stating that he would get the certificates from the bank and deliver them as soon as the sale was made. On that date, March 9, 1928, the broker sold 1,000 shares for petitioner' account and in completion of the sale the petitioner, on March 9, 1928, got the identical certificates; numbered 27,417 to 27,425, inclusive, and 27,556, from the bank and delivered them to the broker. The petitioner then received a check from the broker in the amount of $26,310, representing the proceeds of the sale, which he deposited with the bank and paid off the loan.

was had thereon on July 8, 1936, at which time there was no appearance for the petitioner and the recomputation filed by the respondent was not contested. Wherefore, it is

Ordered and Decided that there is a deficiency in income tax due from the petitioner for 1929 in the amount of $5,139.20.

Eugene Black, Member. (Seal, U. S. Board of Tax Appeals 1924.)

Enter: Entered July 10, 1936.

[fol. 24] Before United States Board of Tax Appeals

[Title omitted]

Motion to Vacate Order of Redetermination and for Rehearing—Filed October 10, 1936

Comes now the petitioner by his attorney, Claude M. Houchins, and moves the Board to vacate and set aside its decision entered herein on July 10, 1936, and for rehearing and reconsideration upon the following grounds:

1. The decision is contrary to the evidence.

2. The opinion and decision are erroneous in law.

The facts upon which this motion is based are as follows:

For 1929, the Board erred in finding that the shares of National Power & Light Company stock delivered on June 19, and July 1, by the bank to the broker through mistake on the part of the bank, were the shares actually sold by the petitioner, and the Board also erred in finding that the bank was agent of the petitioner in making the delivery of the stock. The Board should have found that the shares ordered sold by the petitioner controlled as against the mistaken delivery by the bank.

Claude M. Houchins, 1001 15th St., N. W., Washington, D. C., Counsel for Petitioner.

Dated Oct. 12, 1936.

Charles P. Smith, Member U. S. Board of Tax Appeals.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

PETITION FOR REVIEW—Filed January 12, 1937

James E. Davidson, the petitioner in this case, hereby files his petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of a decision by the United States Board of Tax Appeals, promulgated on May 8, 1936, being 34 B. T. A. No. 83, redetermining a deficiency in the petitioner's income taxes for the calendar year 1929 in the amount of $5,129.20, and the petitioner respectfully shows:

I

The petitioner is an individual residing in the City of Omaha, County of Douglas, State of Nebraska, is a citizen of the said State of Nebraska, and filed his income tax return for the calendar year 1929 with the Collector of Internal Revenue for the Collection District of Nebraska.

II

The controversy involves the petitioner's liability for Federal income taxes for the calendar year 1929. The respondent originally determined and asserted a deficiency against this petitioner for the year 1929 in the amount of $9,352.50. The United States Board of Tax Appeals redetermined the deficiency for 1929 to be $5,129.20; of which redetermination this taxpayer seeks a review by this court.

On June 9, 1929, the petitioner ordered his broker to sell 500 shares of stock in the National Power and Light Company, instructing the broker specifically to sell 500 of 1,000 shares of such stock purchased on March 27, 1929. Certificates for such shares, numbered 80,250 to 80,258 inclusive, and 80,264, had been delivered to petitioner shortly after his purchase and had been deposited by the petitioner with the Omaha National Bank as collateral for a loan.

When the sale was made on June 19, 1929, the petitioner called at the Omaha National Bank to obtain certificates for [fol. 26] delivery to his broker, but the Bank refused to release the certificates to the petitioner, stating that the bank itself would make delivery to the broker. The petitioner then instructed the bank to deliver 500 shares from certi-

ficates numbers 80,250 to 80,258, inclusive, and 80,264. A bank clerk, admittedly by mistake, delivered certificates from another lot of similar stock, which lot had been held as collateral by the Bank since 1925; such mistake was not known to the petitioner at the time.

On July 1, 1929, the petitioner ordered his broker to sell the remaining 500 shares of the 1,000 shares of National Power and Light Company stock purchased on March 27, 1929. At the time the sale was made, the petitioner instructed the Omaha National Bank to deliver to his broker certificates for 500 shares from the remainder of the certificates numbered 80,250 to 80,258, inclusive, and 80,264. Again, however, the bank made the same mistake and delivered to the broker certificates for 500 shares from the same lot of similar stock which it had held as collateral since 1925. The selling price of the 500 shares sold on June 19, 1929, was $28,042.50, and of the second 500 shares sold July 1, 1929, was $31,392.50, totaling $59,435. The cost of the 1,000 shares purchased by the petitioner on March 27, 1929, represented by certificates numbered as above, was $49,900. The cost of the 1,000 shares originally represented by the certificates delivered by mistake to the broker by the bank was $4,420.

In his income tax return for 1929, the petitioner treated the 1,000 shares sold on June 19 and July 1, 1929, as consisting of the 1,000 shares purchased by him on March 27, 1929, at a cost of $49,900. The respondent determined the deficiency by applying the first-in-first-out rule. The Board of Tax Appeals held that the certificates delivered to the broker identified the shares sold, and that the gain from the sale of the 1,000 shares should be determined by comparing the selling price of $59,435 with the cost of the shares delivered to the broker for sale (under the Board's theory, $4,420) and computed the deficiency accordingly.

The final order of the Board determining the deficiency of $5,129.20 was entered on July 10, 1936. The petitioner filed with the Board of Tax Appeals on October 10, 1936, a motion to vacate the judgment of the Board and for rehearing; such motion was denied by an order of the Board entered October 12, 1936.

[fol. 27] III

The petitioner, being aggrieved by the findings of fact and constructions of law contained in the said findings and opin-

ion of the Board of Tax Appeals, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Eighth Circuit.

IV

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

(1) The holding that the delivery of certificates to his broker by petitioner or his agent, in itself alone, definitely identified the shares sold on June 19, and July 1, 1929.

(2) The holding that the delivery for sale of certificates for shares of stock to a broker by petitioner or his agent definitely identified the shares sold, notwithstanding petitioner's specific direction to his broker to sell shares purchased on March 27, 1929, and his specific directions to the Omaha National Bank to deliver to the broker certificates issued in respect of such shares.

(3) The failure to hold that in each of the sales of June 19 and July 1, 1929, petitioner's specific instructions to his broker to sell shares in the National Power and Light Company purchased on March 27, 1929, was sufficient in itself to identify the shares sold on such dates.

(4) The failure to hold that in each of the sales of June 19 and July 1, 1929, petitioner's specific instructions to his broker to sell and to the Omaha National Bank to deliver to his broker certificates issued in respect of shares in the National Power and Light Company purchased on March 27, 1929, were sufficient to identify the shares sold on such dates.

(5) The failure to hold that the petitioner's positive instructions to the Omaha National Bank to deliver in the case of each sale, shares from certificates numbered 80,250 to 80,258, inclusive, and 80,264, identified the blocks of 500 shares each sold on June 19 and July 1, 1929 as the shares purchased on March 27, 1929.

(6) The holding that the Omaha National Bank was the agent of the petitioner for the purpose of delivering shares to his broker, under the facts found by the Board of Tax Appeals.

(7) The holding that the petitioner was bound by the mistake of the Omaha National Bank in delivering to peti-

[fol. 28] tioner's broker certificates other than those which the bank was specifically ordered to deliver to carry out each of the sales of June 19 and July 1, 1929.

(8) The holding that the petitioner was bound by the mistake of his alleged agent, where such alleged agent failed and neglected to carry out the petitioner's specific instructions, in each of the sales of June 19 and July 1, 1929, to deliver to his broker certificates for 500 shares from those numbered 80,250 to 80,258, inclusive, and 80,264.

(9) The holding that the delivery by the Omaha National Bank, admittedly by error and contrary to the petitioner's specific instructions, of certificates issued in respect of shares acquired prior to March 27, 1929, identified the shares sold on June 19 and July 1, 1929, notwithstanding petitioner's express directions to his broker to sell the shares purchased March 27, 1929.

(10) The finding that the petitioner's instructions on June 19, 1929, to his broker to sell 500 of the shares purchased on March 27, 1929, did not identify the 500 shares sold on such date, where through error on the part of the Omaha National Bank, the certificates acquired by the petitioner in respect of stock purchased prior to March 27, 1929, were delivered to the broker.

(11) The finding that the petitioner's instructions on July 1, 1929, to his broker to sell the remaining 500 shares of the 1,000 shares purchased on March 27, 1929, did not identify the 500 shares sold on July 1, 1929, where certificates acquired by the petitioner in respect of stock purchased prior to March 27, 1929, were delivered by the Omaha National Bank to the petitioner's broker through error.

(12) The finding that the 500 shares of stock in the National Power and Light Company sold by the petitioner on June 19, 1929, were not part of the 1,000 shares purchased by the petitioner on March 27, 1929.

(13) The finding that the 500 shares of stock in the National Power and Light Company sold by the petitioner on July 1, 1929, were not the remaining portion of the 1,000 shares purchased by the petitioner on March 27, 1929.

(14) The finding that the 1,000 shares of stock in the National Power and Light Company sold by the petitioner in his two sales of June 19 and July 1, 1929, consisted of shares previously acquired by the petitioner and held by the Omaha National Bank as collateral since 1925.

[fol. 29] (15) The failure to find that the 1,000 shares of National Power and Light Company stock sold on June 19 and July 1, 1929, consisted of the 1,000 shares purchased by petitioner on March 27, 1929.

(16) The finding that the 1,000 shares of stock in the National Power and Light Company sold by the petitioner in his two sales of June 19 and July 1, 1929, had a cost or other basis to the petitioner for the purpose of determining gain or loss of $4,420, instead of $49,900.

(17) The finding of a deficiency for the year 1929 in the amount of $5,129.20, in lieu of a determination that there was no deficiency in income taxes due from the petitioner for the year 1929.

George Rogers, of Gardner, Morrison and Rogers, 1126 Woodward Building, Washington, D. C., Counsel for Petitioner.

Duly sworn to by George Rogers. Jurat omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTICE OF FILING OF PETITION FOR REVIEW—Filed January 12, 1937

Mr. Morrison Shafroth, Assistant General Counsel for the Bureau of Internal Revenue, Washington, D. C.

Please take notice that the petitioner on the 12th day of January, 1937, A. D. filed with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for [fol. 30] the Eighth Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above entitled cause. A copy of the petition for review and the assignments of error as filed, is hereto attached and served upon you.

Done at Washington, D. C. this 12th day of January, A. D. 1937.

Respectfully, George Rogers, Counsel for Petitioner, Gardner, Morrison and Rogers, 1126 Woodward Building, Washington, D. C., of Counsel.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 12th day of January, A. D. 1937.

Morrison Shafroth, Chief Counsel for the Bureau of Internal Revenue, Counsel for Respondent.

BEFORE UNITED STATES BOARD OF TAX APPEALS

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 5, 1937

To the Clerk of the United States Board of Tax Appeals:

You are hereby respectfully requested to prepare, certify, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, with reference to the petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause prepared and transmitted as required by law and by the rules of the said Court, and to include in such transcript of record the following documents, or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) The petition of James E. Davidson for redetermination of tax liability.

[fols. 31-32] (b) Answer of the respondent.

(c) Motion for leave to file amendment to answer and order of Board of Tax Appeals granting leave.

(d) Amendment to answer.

(3) Findings of fact and opinion of the Board of Tax Appeals.

(4) Order correcting the findings of fact of the Board of Tax Appeals.

(5) Decision of the Board of Tax Appeals.

(6) Motion to vacate and for rehearing, and order denying such motion.

(7) The petition for review filed by the petitioner in the above cause.

(8) The notice of filing petition for review, including acknowledgment of service of such notice and petition.

(9) This praecipe for record with acknowledgment of service thereon and date of filing.

George Rogers, Counsel for Petitioner.

Service of the above and foregoing praecipe and receipt of copy thereof are hereby acknowledged.

The foregoing praecipe for record is approved.

Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue.

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 33-34] Appearances of counsel omitted in printing.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

ORDER OF SUBMISSION—October 12, 1937

These causes, Nos. 10883 and 10884, having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. E. J. Svoboda for petitioners, continued by Mr. Harry Marselli, Special Assistant to Attorney General, for respondent, and concluded by Mr. E. J. Svoboda for petitioners.

Thereupon, these causes were submitted to the Court on the transcripts of the records from said Board of Tax Appeals and the briefs of counsel filed herein.

[fol. 36] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1937

No. 10,883

JAMES E. DAVIDSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review Decision of United States Board of Tax Appeals

Mr. E. J. Svoboda (Mr. J. A. C. Kennedy, Mr. Yale C. Holland, Mr. G. L. DeLacy and Mr. R. E. Svoboda, on the brief) for Petitioner.

Mr. Harry Marselli, Special Assistant to the Attorney General (Mr. James W. Morris, Assistant Attorney General, and Mr. Sewall Key, Special Assistant to the Attorney General, on the brief) for Respondent.

Before Stone, Woodrough and Van Valkenburgh, Circuit Judges

OPINION—January 27, 1938

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court:

This case comes upon petition to review an order of redetermination of the Board of Tax Appeals whereby it was decided that there is a deficiency in income tax due from the [fol. 37] petitioner for 1929 in the sum of $5,129.50. The facts concerning the sale of stocks from which the questions here presented arise are thus found by the Board of Tax Appeals:

"On June 19, 1929, the petitioner instructed the broker to sell 500 of the 1,000 shares purchased on March 27, 1929, certificates for which were on deposit at the Omaha National Bank. When the sale was made the petitioner called at the bank to get the certificates for delivery to the broker, but the bank refused to release them to the petitioner, stating that they would make delivery themselves. The petitioner then instructed the bank to deliver 500 shares from the certificates numbered 80,250 to 80,258, inclusive, and 80,264.

In making delivery of the certificates, however, a bank clerk, by mistake, delivered certificates from another lot which had been held as collateral by the bank since 1925. Th mistake was not known by the petitioner at that time.

On July 1, 1929, the petitioner instructed the broker to sell the remaining 500 shares purchased on March 27, 1929. When this sale was made he instructed the bank to deliver to the broker certificates for 500 shares from the remainder of the certificates numbered 80,250 to 80,258, inclusive, and 80,264. Again, however, the bank made the same mistake and delivered to the broker certificates for 500 shares from the same lot which it had held as collateral since 1925. The selling price of the first 500-share lot sold by the broker on June 19, 1929, was $28,042.50 and of the second 500-share lot sold July 1, 1929, was $31,392.50. The cost of the 1,000 shares purchased by the petitioner on March 27, 1929, represented by certificates 80,250 to 80,258, inclusive, and 80,264, was $49,900. The cost of the 1,000 shares delivered to the broker by mistake was $4.42 per share or $4,420 for the 1,000 shares."

The facts thus found are undisputed, and from them it appears that the income profit on the shares sold over their cost is $55,015, and that such profit on the shares intended to be sold over their cost would have been $9,335. It is the contention of petitioner that the latter basis of computation should be employed, in which case there would be no deficiency in tax liability under returns made. The Board of Tax Appeals held that the shares delivered to the broker were the shares actually sold by the petitioner. The question presented for our answer is thus succinctly stated by government counsel:

[fol. 38] "Whether the taxable gain from the sale of 1,000 shares of certain stock in 1929 is to be determined, as the Board held, upon the basis of the cost of the shares which the taxpayer actually sold, as represented by the certificates actually delivered in consummating the sale, which certificates have been identified, rather than, as the taxpayer claims, upon the basis of the cost of the shares which he intended to sell and instructed the broker to sell."

It is the contention of the petitioner that the decisions of the Supreme Court and of the various Circuit Courts of Appeals have established as a matter of law that the taxpayer in all cases sufficiently identifies the shares to be sold when he designates such shares as being those purchased on a particular date. It is obvious, upon reading the decisions which the diligence of able counsel have cited for our consideration, that what superficially may appear to be divergent views are in most cases susceptible of reconciliation because of crucial differences in the situations presented. There are however a number of matters of law upon which there is substantial agreement. Concededly the decision of the Supreme Court in Helvering v. Rankin, 295 U. S. 123, is the pronouncement of that court which most materially affects the question here presented, and interpretations placed upon its language by the Circuit Courts of Appeals have largely been the basis of their rulings.

Treasury Regulation No. 74, Art. 58, provides that "when shares of stock in a corporation are sold from lots purchased at different dates and at different prices, and the identity of the lots cannot be determined, the stock sold shall be charged against the earlier purchases of such stock". In the Rankin case the petitioner was engaged in marginal transactions in none of which did the broker deliver to him, nor he to the broker, any stock certificate. The purchases and sales were made through the medium of street certificates handled by the broker, and the transactions were evidenced solely by debits and credits in the taxpayer's account on the broker's books. Through orders communicated to his broker he had made it plain that 1200 shares first purchased by him were in the nature of a permanent commitment on his part, and that the sales of stock incidental to his marginal transactions were to be consummated from stock later purchased. In this state of facts the Commissioner and Board concluded that it was impossible [fol. 39] to determine the identity of the lots purchased and sold, and that, consequently, the "First-in, first-out" regulation above quoted should be applied. The basis of the Commissioner's contention was that all the street certificates of stock held in the name of the broker were commingled and indistinguishable, and that, in such transactions, no certificate was issued in the name of the customer.

or earmarked for or otherwise allocated to him. Mr. Justice Brandeis said:

"The fallacy of this argument lies in the assumption that shares of stock can be identified only through stock certificates. It is true that certificates provide the ordinary means of identification. But it is not true that they are the only possible means. * * * The required identification is satisfied if the margin trader has, through his broker, designated the securities to be sold, as those purchased on a particular date and at a particular price. It is only when such a designation was not made at the time of the sale, or is not shown, that the First-in, first-out rule is to be applied."

Other matters were considered in this opinion, but the points ruled of interest here are that stock certificates, while the ordinary, are not the only possible, means of identification; and that the First-in, first-out rule applies in marginal transactions only when the identification of sales and purchases is not possible by any relevant evidence. In the instant case no marginal transactions are involved, and the "First-in, first-out" rule has no application. All the courts agree that the mere intention of the trader to sell particular shares without further identification is insufficient. Snyder v. Commissioner, 295 U. S. 134, 137; Vawter v. Commissioner, (C. C. A. 10) 83 F. (2d) 11; Horner v. Commissioner, (C. C. A. 3) 72 F. (2d) 407; Skinner, et al. v. Eaton, (C. C. A. 2) 45 F. (2d) 568. In Curtis v. Commissioner, 89 F. (2d) 736, this court had under consideration a case in which there was no mistake in the transaction as consummated. Everything was done under and in accordance with the desires of the petitioner who had the choice of so handling the matter that the transfer of stock could have been made from that acquired from a specific source. This court in that case recognized the certificate as the customary means of identification of stock in the following language:

"It may readily be conceded that certificates for stock are not the exclusive method of identifying stock dealt with, [fol. 40] but 'it is true that certificates provide the ordinary means of identification'." Citing Helvering v. Rankin, supra. It ventured no opinion as to the controlling effect of instructions if violated by a selling agent, and held that in the situation presented it must consider and follow what

by the taxpayer himself to the broker or by a bank to the broker. I do not agree that the difference in the facts is a sound basis for distinguishing the cases. A broker, just like a bank, is merely the agent of the seller, and where it appears, as it did in the Miller and McCarter cases, that the certificate actually delivered was identifiable as that pertaining to a different lot of stock from the one which the taxpayer designated for sale, there is just as good reason for holding the seller to the basis applicable to the shares represented by the certificate actually delivered as there is in the present case. I agree with the result reached in the present case because I think that identification by certificates is a better method of identification than identification by designation to the broker. See William W. Miller, [fol. 23] 31 B. T. A. 192, and my dissent in Usal H. McCarter, 34 B. T. A.—(No. 81).

McMahon and Turner agree with the above.

DISSENTING OPINION

ARUNDELL, Dissenting:

In the case of Usal H. McCarter, 34 B. T. A.—(No. 81), we definitely held that we would follow the rule laid down by the Second Circuit in Miller vs. Commissioner, 37 Fed. (2d) 213, to the effect that a designation to the broker of the shares to be sold is controlling although the certificate delivered does not correspond with the instructions given. I think we depart from that ruling in the instant case when we hold that the mistaken delivery by the banker of certain certificates shall prevail as an identification of what was intended to be sold over the very definite instructions of the owner to the contrary. The two rulings cannot be reconciled. We should adhere to the rule announced in Miller, supra.

Van Fossan, Mellott, and Arnold agree with this dissent.

(Seal, U. S. Board of Tax Appeals 1924.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ORDER AMENDING FINDINGS OF FACT

On motion of the respondent filed in these proceedings on May 23, 1936, the findings of fact contained in the Board's report promulgated May 8, 1936, are amended in the following respects:

The amount of $28,042.50 appearing in line 16, page 5, is changed to $28,142.50."

The words "her holdings" appearing on line 7, page 6, are changed to read "the 1,100 shares bought May 11, 1928."

The sentence beginning on line 23, page 6, is changed to read—

"In order to complete the transaction, however, the petitioner took from her safety deposit vault certificates for [fol. 23] 400 other shares received January 2, 1929, as stock dividend on stock of American Gas & Electric Company of a previous purchase, together with 570 shares received on the same date as stock dividend on the 1,100 shares of the said stock bought May 11, 1928, and delivered these certificates to the broker"

The word "thereon" is inserted between the words "dividend" and "of" appearing on page 6 in the last sentence of the last paragraph of the findings of fact.

Dated: June 15, 1936.

Charles P. Smith, Member. (Seal, U. S. Board of Tax Appeals 1924.)

CPS:aa.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ORDER OF REDETERMINATION—July 10, 1936.

Pursuant to the findings of fact and opinion of the Board in the above-entitled proceeding promulgated May 8, 1936, the respondent, on June 12, 1936, filed a notice of settlement with statement of recomputation attached. Hearing

the taxpayer did and not what he might have done. Citing United States v. Safety Car heating Co., 297 U. S. 88, 96, and Bonham v. Commissioner, (C. C. A. 8) 89 F. (2d) 725.

In Vawter v. Commissioner, 83 F. (2d) 11, the Tenth Circuit Court of Appeals makes a similar reservation with respect to neglect or mistake on the part of a broker or selling agent, where different shares are delivered in violation of the taxpayer's intention and direction; but holds, in the case before it, that "it is well settled that, where a taxpayer has stock in his possession and deliberately delivers certain shares in consummation of a sale, he cannot afterwards say in computing income tax liability that he intended to sell other shares".

In Miller v. Commissioner, 80 F. (2d) 213, the Circuit Court of Appeals for the Second Circuit, in denying the application of the "First-in, first-out" rule, held that "a designation by instructions to the broker of the shares to be sold is controlling, though the certificate delivered does not correspond with the instructions", and that, where there is a designation such as was found sufficient in Helvering v. Rankin, supra, "it can make no difference whether the stock is held on margin or not". In that case the certificates were in the possession of the broker, who also held from the taxpayer written instructions to sell, embodying the number of shares and dates of purchase.

With the greatest respect for the eminent judges of the Second Circuit, we find ourselves unable to concur in the broad holding that a designation by instructions to the broker is controlling in all cases, though the certificate delivered does not correspond with the instructions. In the case at bar it is conceded that selling directions were given to the broker. It does not appear from the record that the instructions were written, as they were in the Miller case.

In our opinion the language used by Mr. Justice Brandeis in the Rankin case, in view of the situation there presented, fairly justifies the inference that identification by certifi- [fol. 41] cate is the best method where possible and available. This construction is especially applicable to the facts found in the present case, which differs in some phases from others brought to our attention. The certificates were in the possession of the taxpayer as between him and the broker, and the sale was to be consummated by their delivery.

Where such is the case the certificates, in the absence of special circumstances, not present here, should control as the best means of identification available. It should be noted that both the bank in which they were deposited, and the broker who made the sale were the agents of the taxpayer. The negligence alleged must be imputed to him. No responsibility attaches to the government. The result is that the taxpayer, while failing to realize the special benefit intended, has received the profit inuring from the sale actually made, while, if his present contention be indulged, the government has lost the income normally and legally taxable upon the transaction. It is uniformly held that tax liability must be determined by what in fact is done. United States v. Phellis, 257 U. S. 156, 172; United States v. Safety Car Heating Co., 297 U. S. 88, 96; Remington-Rand, Inc. v. Commissioner, (C. C. A. 2) 33 F. (2d) 77, 78; Bonham v. Commissioner, (C. C. A. 8) 89 F. (2d) 725, 728; Curtis v. Commissioner, (C. C. A. 8) 89 F. (2d) 736, 738; Horner v. Commissioner, (C. C. A. 3) 72 F. (2d) 407 and 78 F. (2d) 813. And this must be true if a dependable rule is to be established applicable to situations such as this.

While no ulterior purpose is to be attributed to the petitioner in this case, it is not difficult to perceive that the rule for which he contends may be made the means of tax evasion by collusion between taxpayer and broker. We do not mean to imply such contract in this case. The petitioner undoubtedly acted in good faith, and the broker presumably acted upon the certificates furnished for delivery in consummation of the sales. Notwithstanding the instructions given, the broker may well have assumed that the certificates furnished evidenced the final purpose of the trader. Compare Skinner v. Eaton, (C. C. A. 2) 43 F. (2d) 368, 370. The broker had no reason to suspect that the delivery of the certificates was not the deliberate act of petitioner, that being the adopted method of identifying the shares to be furnished in consummation of the sales.

[fol. 42] Being of opinion that the conclusion reached by the Board of Tax Appeals is fully supported by the facts found, its order of redetermination is

Approved and Affirmed.

[fol. 43] In United States Circuit Court of Appeals, Eighth Circuit

No. 10883

James E. Davidson, Petitioner,

vs.

Commissioner of Internal Revenue

Decree—January 31, 1938

On Petition to Review Decision of United States Board of Tax Appeals.

This cause came on to be heard on the petition to review an order of redetermination of the United States Board of Tax Appeals deciding there is a deficiency in the income tax due from the petitioner for the year 1929, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of redetermination of the said Board of Tax Appeals in this cause, be, and the same is hereby, approved and affirmed.

And it is further ordered by this Count that the petition to review herein, be, and the same is hereby, dismissed without the taxation of costs in favor of either of the parties in this Court.

January 31, 1938.

[fol. 44] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Petition for Rehearing—Filed February 11, 1938

Comes now the Petitioner and moves the Court for an order setting aside the opinion and decision rendered in the above entitled case on the 27th day of January, 1938, and granting the Petitioner a rehearing for the following reasons:

I

The Court erred in holding that the certificates delivered to the broker by the Bank Clerk, through error and con-

trary to the instructions of the Petitioner, identified the [fol. 45] shares of stock sold by the Petitioner and were controlling as to such identification as against a specific designation by the Petitioner to sell on June 19 and July 1, 1929, the shares of stock purchased by the Petitioner on March 27, 1929.

II

The Court erred in holding that the Petitioner was b[illegible] by the mistake of the Bank Clerk and the broker in [illegible]livering and selling the certificates delivered through error by the Bank Clerk where the Petitioner had specifically instructed the Bank to deliver the certificates by designating certificate numbers representing stock purchased on March 27, 1929, and where the Petitioner by specific instructions to the broker ordered the sale of the shares of stock purchased by the Petitioner on March 27, 1929.

James E. Davidson, Petitioner. J. A. C. Kennedy, Yale C. Holland, G. L. DeLacy, E. J. Svoboda, R. E. Svoboda, Attorneys for Petitioner.

Attorney's Certificate

I, Edward J. Svoboda, certify that I am one of the attorneys for the Petitioner in the above case; that as such I have had charge of the trial and appeal of the said case on petition to review the decision of the United States Board of Tax Appeals and am familiar with all of the issues therein involved, and I further certify that the foregoing Petition for Rehearing is presented in good faith and not for the purposes of delay.

Edward J. Svoboda, One of the Attorneys for Petitioner.

[fol. 46] [File endorsement omitted]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—February 22, 1938

The petition for rehearing filed by counsel for petitioner in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

In United States Circuit Court of Appeals

Motion to Stay Issuance of Mandate—Filed March 2, 1938

Now comes the Petitioner, James E. Davidson, and moves the Court to enter an order withholding and staying the mandate in the above entitled cause for the reason that it is the bona fide intention of the Petitioner to make proper application to the Supreme Court of the United States for a Writ of Certiorari in this case within the next sixty (60) days, and, in any event, without delay.

This Motion is made pursuant to the provisions of Section 350 of Title 28 of the United States Code to enable Petitioner to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States.

The Petition for Certiorari will be filed and the Writ of Certiorari applied for for the reason that there is a diversity of decision, particularly between the Second Circuit of the United States Circuit Court of Appeals, and the Eighth Circuit of the United States Circuit Court of Appeals on the issues as presented in this case.

[fol. 47] The time to prepare, print and file such Petition for Certiorari in the Supreme Court of the United States has not yet elapsed and the Petitioner is reasonably certain that a Writ of Certiorari will be allowed and granted by the Supreme Court of the United States.

The Transcript of the record in this cause has been ordered from the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit and the Petition for Certiorari is in the course of preparation and will be shortly submitted to the Clerk of the Supreme Court of the United States for printing, as soon as a transcript of the record can be obtained and appropriate page references inserted in the petition for Certiorari.

The affidavit of Edward J. Svoboda, one of the counsel for Petitioner, is filed herewith in support hereof.

James E. Davidson, by Kennedy, Holland, DeLacy & Svoboda, Edward J. Svoboda, His Attorneys.

AFFIDAVIT IN SUPPORT OF MOTION TO STAY MANDATE

UNITED STATES OF AMERICA,
State of Nebraska,
County of Douglas, ss:

Edward J. Svoboda, being first duly sworn upon his oath, deposes and says that he is one of the counsel for the Petitioner herein and that he prepared the Petitioner's Brief filed in this Court; that he is a duly licensed and practicing attorney at law; that the Motion for Re-hearing in this cause was overruled on February 22, 1938 and that unless the Motion to Stay Mandate of the Petitioner is allowed [fol. 48] and an order issued to stay and withhold the Mandate, pending the filing of a Petition for Certiorari to the Supreme Court of the United States, the Mandate of the United States Circuit Court of Appeals for the Eighth Circuit will issue on March 5, 1938; that the Petitioner does not have sufficient time to have the Transcript of Record in the above entitled matter printed and filed with the Clerk of the Supreme Court of the United States before the time for the issuance of such Mandate by the United States Circuit Court of Appeals for the Eighth Circuit unless the Motion for the staying and withholding of the said Mandate is allowed and order issued pursuant to such Motion; that it is the bona fide intention of the Petitioner to make application to the Supreme Court of the United States for a Writ of Certiorari within the time allowed by law and more specifically within at least sixty (60) days; that affiant has already ordered from the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit a transcript of the record; that a Petition for Certiorari to the Supreme Court of the United States is in the course of preparation and awaits the record ordered from the Clerk of this Honorable Court for insertion of appropriate page references to the transcript of record; that the said Petition and the said Transcript will be filed without delay in the Supreme Court of the United States; that affiant believes that there is merit in the Petition for Writ of Certiorari and that the judgment of the United States Circuit Court of Appeals of the Eighth Circuit ought to be reversed by the Supreme Court of the United States; that the affiant believes that in equity and in justice, the mandate herein should be stayed until the Petitioner can, with all due

diligence, have completed the Transcript of Record and the Petition for Writ of Certiorari, and have the same filed with the Clerk of the Supreme Court of the United [fol. 49] States; that Petitioner should have a reasonable time, not exceeding sixty (60) days in which to prepare and file such Petition for Certiorari with the Transcript of the Record, and that the mandate herein should be stayed for a reasonable time, not in excess of sixty (60) days, to permit the cause to be transferred to the Supreme Court of the United States, and if the Writ of Certiorari is allowed and granted, such additional time until the cause is decided by the Supreme Court of the United States.

Edward J. Svoboda.

Subscribed and sworn to before me this 1st day of March, 1938. Dorothy Minturn, Notary Public. (Seal.)

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—March 3, 1938

On Consideration of the motion of petitioner for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 16, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,393. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 18. James E. Davidson, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed April 1, 1938. Term No. 18 O. T., 1938.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 1 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1937

No. [redacted] 18

JAMES E. DAVIDSON,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

J. A. C. KENNEDY,
YALE C. HOLLAND,
GEORGE L. DELACY,
EDWARD J. SVOBODA,
RALPH E. SVOBODA,
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Law Briefs—OMAHA LINO-SLUG CO.—418 South 15th Street

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IN THE

Supreme Court of the United States

October Term, 1937

No.....

JAMES E. DAVIDSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

James E. Davidson prays that a Writ of Certibrari issue to review the final judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled cause on January 31, 1938 (R., p. 40), approving and affirming the order of redetermination of the Board of Tax Appeals in said cause (entered on July 10, 1936; R., p. 23), wherein the Board of Tax Appeals found a deficiency in income tax

due from the petitioner for the year 1929 in the amount of $5,129.20.

Statement of Facts

The petitioner had filed a petition to review an order of redetermination of the Board of Tax Appeals in the United States Circuit Court of Appeals of the Eighth Circuit, wherein the Board of Tax Appeals had determined a deficiency in income tax due from the petitioner for the year 1929 in the sum of $5,129.50, based upon the findings of fact of the Board of Tax Appeals, which are undisputed and are as follows:

> "On June 19, 1929, the petitioner instructed the broker to sell 500 of the 1,000 shares purchased on March 27, 1929, certificates for which were on deposit at the Omaha National Bank. When the sale was made the petitioner called at the bank to get the certificates for delivery to the broker, but the bank refused to release them to the petitioner, stating that they would make delivery themselves. The petitioner then instructed the bank to deliver 500 shares from the certificates numbered 80,250 to 80,258, inclusive, and 80,264. In making delivery of the certificates however, a bank clerk, by mistake, delivered certificates from another lot which had been held as collateral by the bank since 1925. The mistake was not known by the petitioner at that time.
>
> "On July 1, 1929, the petitioner instructed the broker to sell the remaining 500 shares purchased on March 27, 1929. When this sale was made he instructed the bank to deliver to the broker certificates for 500 shares from the remainder of the certificates numbered 80,250 to 80,258, inclusive, and 80,264. Again, however, the bank made the same mistake and delivered to the broker certificates for 500 shares from the same lot which it had held as collateral since

1925. The selling price of the first 500-share lot sold by the broker on June 19, 1929, was $28,042.50 and of the second 500-share lot sold July 1, 1929, was $31,392.50. The cost of the 1,000 shares purchased by the petitioner on March 27, 1929, represented by certificates 80,250 to 80,258, inclusive, and 80,264, was $49,900. The cost of the 1,000 shares delivered to the broker by mistake was $4.42 per share or $4,420 for the 1,000 shares."

(R., p. 14, and in decision of Circuit Court of Appeals, R., p. 35.).

The facts thus found are undisputed and from them it appears that the profit on the shares, which the petitioner ordered to be sold over their cost, would have been $9,335.00; whereas, the profit on the shares based on the certificates delivered by error by the bank to the broker is $55,015.00. It is the contention of the petitioner that the basis of computation of the profit should be upon the basis of the shares of stock ordered to be sold under instructions of the petitioner, and not upon the basis of the cost of the certificates delivered by the bank through error.

Question Presented

The question presented is therefore whether the taxable gain from the sale of 1,000 shares of the stock in 1929 is to be determined upon the basis of the cost of the shares which the petitioner had ordered and instructed the broker to sell, or upon the basis of the cost of the certificates delivered by the bank through error to the broker.

It is the contention of the petitioner that the decisions of the Supreme Court of the United States, and of the various Circuit Courts of Appeals, have established

as a matter of law that the taxpayer, and petitioner in this case, identified the shares to be sold when the petitioner designated such shares as being those purchased on a particular date, and when he instructed and ordered the broker to sell the shares so identified by the taxpayer and petitioner.

Reasons for Granting the Petition

1. The Circuit Court of Appeals erred in holding that the certificates of stock, delivered by error by the bank to the broker, identified the shares sold.

2. The Circuit Court of Appeals erred in not holding that where the taxpayer orders certain shares of stock sold, designating such shares by date of purchase, that such designation controls as against a mistaken delivery of certificates by a bank clerk.

3. The Circuit Court of Appeals erred in not holding that the basis of computing the gain on the stock sold was on the cost of the shares ordered sold and identified by purchase dates, and not on the basis of the cost of the certificates delivered by error by the bank clerk.

4. The Circuit Court of Appeals erred in not holding as a matter of law that petitioner's designation of shares to be sold by the broker sufficiently identified the shares sold, even though the bank clerk, through error, delivered certificates representing other shares to the broker.

5. The case raises an important question of Federal Law, which has been decided in other Circuit Courts of Appeals, and the decision of the Circuit Court of Appeals in this case is in conflict with the decision of the United

States Supreme Court and other Circuit Courts of Appeals on the same matter.

Helvering v. Rankin, 295 U. S. 123-134, 79 L. Ed. 1343.
Hobert v. Penrose, 38 Fed. (2d) 577 (C. C. A. 10).
Miller v. Comm. of Internal Revenue, 80 Fed. (2d) 219 (C. C. A. 2).
Fuller v. Comm. of Internal Revenue, 81 Fed. (2d) 176 (C. C. A. 1).
Milliken v. Comm. of Internal Revenue, 83 Fed. (2d) 213 (C. C. A. 2).
Kraus v. Comm. of Internal Revenue, 88 Fed. (2d) 616 (C. C. A. 2).

6. The principle involved is one of great general importance to the Government as well as the taxpayers, in that a definite yardstick, or rule, should be established by the United States Supreme Court, applicable to all jurisdictions, whereby the profit upon sale of shares of stock may be determined; that is, whether the designation of the shares to be sold by date of purchase, is to be used as a yardstick, or whether a delivery of other certificates (in this case through error of the bank clerk) is to be used as the basis for determining loss or gain.

7. In this case the Circuit Court of Appeals of the Eighth Circuit erroneously applied the rule, that the delivery of certificates, and the cost thereof, is controlling over a designation by the taxpayer to the broker of specific shares to be sold by dates of purchase, even though the certificates used were delivered by error of a bank clerk contrary to instructions of the petitioner.

8. The decision in this case is based upon a misconception of the rule laid down by the Supreme Court of

the United States in *Helvering v. Rankin*, 295 U. S. 123, and, using as the basis for its decision the cases of *Vawter v. Commissioner*, 83 Fed. (2d) 11 (C. C. A. 10); *Horner v. Commissioner*, 72 Fed. (2d) 407 (C. C. A. 3); *Skinner v. Eaton*, 45 Fed. (2d) 568 (C. C. A. 2); *Curtis v. Commissioner*, 89 Fed. (2d) 736 (C. C. A. 8); in all of which cases there was merely an intention to sell shares other than represented by certificates delivered; whereas, in the case at bar there was a specific designation of the shares to be sold by date of purchase—a specific designation and not only a secret or undisclosed intention.

Wherefore, it is respectfully submitted that this Petition for Writ of Certiorari, to review the judgment of the United States Circuit Court of Appeals, of the Eighth Circuit, should be granted.

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BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The findings of fact, and the opinion, of the Board of Tax Appeals (R., pp. 10-16).

The Circuit Court of Appeals rendered an opinion on January 27, 1938 (R., p. 35), and also reported in 94 Fed. (2d) 300, *Davidson v. Comm. of Internal Revenue.*

Jurisdiction

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on January 31, 1938 (R., p. 40). Petition for Rehearing overruled February 22, 1938.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 St. 938, 28 U. S. C. A., Sec. 347, page 359.

Statement

A statement of the facts is contained in the Petition for Writ of Certiorari and is incorporated herein by reference, but for sake of brevity will not be repeated nor enlarged upon.

Specifications of Error

The errors relied upon are indicated under "Reasons for Granting the Petition" in the Petition for Writ of Certiorari. They are incorporated herein by reference, but for sake of brevity are not repeated.